No. 83-329

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IN THE

Supreme Court of the United States

October Term, 1983

COUNTY OF ROCKLAND,
Petitioner,

v.

U.S. NUCLEAR REGULATORY COMMISSION and THE UNITED STATES OF AMERICA,
Respondents,

POWER AUTHORITY OF THE STATE OF NEW YORK and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Intervenors-Respondents,

NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC. and UNION OF CONCERNED SCIENTISTS,
Intervenors-Petitioners.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF INTERVENORS-RESPONDENTS IN OPPOSITION

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This brief is submitted by Intervenors-Respondents Power Authority of the State of New York and Consolidated Edison Company of New York, Inc., in opposition to the petition for a writ of certiorari of the County of Rockland. For the reasons set forth below, no good grounds have been set forth for the granting of the petition.

Parties

Intervenor-Respondent Power Authority of the State of New York ("Power Authority") is a corporate municipal instrumentality of the State of New York, a political subdivision of the State exercising governmental and public powers, existing to provide a continuous, adequate and low-cost supply of dependable electric power and energy for the benefit of the people of the State of New York. N.Y. Pub. Auth. Law § 1001 *et seq.* (McKinney 1982). The Power Authority owns and operates a nuclear power plant known as the Indian Point 3 Nuclear Power Plant, located in Buchanan, New York. The Power Authority is licensed and subject to regulation by respondent United States Nuclear Regulatory Commission ("NRC"), and holds NRC Facility Operating License No. DPR-64.

Intervenor-Respondent Consolidated Edison Company of New York, Inc. ("Con Edison") is a public utility corporation principally engaged in the generation and transmission of electric power in the southeastern region of the State of New York. Con Edison owns and operates a nuclear power plant known as the Indian Point Station, Unit No. 2, also in Buchanan, New York. Con Edison is also licensed and subject to regulation by respondent NRC and holds Facility Operating License No. DPR-26.

Respondent NRC is the federal government agency charged with licensing and regulatory functions related to the possession, use, and production of nuclear energy.

Petitioner Rockland County is a county located in part within a ten mile radius of the Indian Point nuclear power plants.

Statement of the Case

This case originated as a challenge by a local government to an order of respondent NRC issued under its regulations controlling radiological emergency planning in the vicinity of nuclear power plants. The NRC had found, and stated in its order, that there were no good grounds for issuance of an order terminating operation of the Indian Point nuclear power plant Units 2 and 3 because of the status of offsite radiological emergency planning by the State of New York and various local governments surrounding the Indian Point site.

Emergency planning at Indian Point, as at other nuclear plants, is governed by the provisions of 10 C.F.R. Part 50. Title 10 C.F.R. § 50.54(q) requires all licensed operators of nuclear power reactors to follow and maintain emergency plans which meet NRC regulations contained in 10 C.F.R. § 50.47, and 10 C.F.R. Part 50, Appendix E. These regulations, which took effect on November 3, 1980, created an entirely new framework within which state and local governments must prepare for virtually any offsite radiological contingency, regardless of its remote probability.

The development and application of the new NRC emergency planning regulations leaves no doubt that emergency planning is a dynamic process which affected governments are required to implement in stages. The first stage of the process is the submission of revised emergency planning documents to the NRC. These documents include response plans of State and local county governments. (10 C.F.R. § 50.54(s)(1).)

Under New York State law, responsibility for the preparation of the State's and counties' plans for disaster preparedness falls upon the State Disaster Preparedness Commission (the "State Commission"). N.Y. Exec. Law §§ 20-22 (McKinney 1982). Pursuant to 10 C.F.R. § 50.54(s)(1), in December 1980, Intervenors-Respondents submitted on-site emergency response plans, together with draft radiological emergency plans of the State and the four counties with territory within a ten mile radius of the Indian Point site, including Petitioner Rockland County.

NRC regulation 10 C.F.R. § 50.54(s)(2) provides that in the event that deficiencies appear in an NRC licensee's emergency plans, including compliance of state and local governmental plans with federal regulations, a four-month period may be allowed for their correction. This four-month period is commonly referred to as the "120-day clock." If at the expiration of the "120-day clock" deficiencies remain, the NRC may institute enforcement action pursuant to 10 C.F.R. Part 2. An order shutting the plant down is one of many enforcement options, but contrary to Petitioner's suggestion is by no means required.

In April 1981, the NRC transmitted to Intervenors-Respondents a deficiency notice regarding the State's and four counties' offsite radiological emergency plans for Indian Point. The NRC's primary concern was with a "conflict between State and county authorities and responsibilities pertaining to radiological emergency preparedness" which was said to "pervade" the plan. Accordingly, in April 1981, the NRC initiated its first "120-day clock." During that period, comprehensive State legislation was enacted which addressed the NRC's concern regarding the conflict among governmental authorities, as well as other radio-

logical emergency preparedness matters. The NRC found this response satisfactory and allowed the "120-day clock" to expire without taking enforcement action. In July and August 1981, the State of New York applied to the Federal Emergency Management Agency ("FEMA") for formal approval of the State and county emergency plans for the Indian Point area. These plans were, and continue to be, approved by the Governor's designee, the Chairman of the State Commission.

As a part of the next stage, in March 1982, the State and four counties held the first full-scale, offsite emergency planning exercise under the revised regulations. While the exercise was successful in most respects, and the NRC found that onsite preparedness was adequate, FEMA made "interim findings," dated July 30, 1982, which advised the NRC of various deficiencies in offsite emergency planning which had surfaced during the exercise. One of the deficiencies cited by FEMA was the failure of Rockland County to participate adequately in the emergency planning process. On August 3, 1982, the NRC initiated a new "120-day clock."

Intervenors-Respondents, FEMA, and the various governmental units involved undertook a major effort during the second 120-day period to address the alleged specific deficiencies cited by FEMA. Shortly after the expiration of the "120-day clock," FEMA provided the NRC with an "update" of its "interim findings" (the "FEMA Interim Update"). In its interim update, which noted only two remaining deficiencies, FEMA commented favorably upon the improvements made in the 120-day period, provided an interim item-by-item report, and stated that the next

element in FEMA's review process would be "an evaluation of preparedness by FEMA at an exercise to be held in March 1983."

In December 1982, after reviewing the FEMA findings, the NRC considered whether it would be appropriate to institute enforcement action at that time. On December 23, 1982, the NRC issued an order concluding that enforcement action would be inappropriate and unnecessary. The NRC stated that:

> Our regulations allow but do not mandate immediate shutdown of the Indian Point units. We rejected a mandatory shutdown formulation when we adopted what is now 10 CFR 50.54(s)(2)(ii). *See* 44 Fed. Reg. 75171 (12/19/79); 45 Fed. Reg. 50705-07 (7/31/80). We do not believe that the two planning standard deficiencies noted by FEMA warrant immediate shutdown.
>
> Accordingly, we have decided that no enforcement action is required at this time. However, the Commission will continue to monitor the progress that is made.

Consolidated Edison Co. of New York, Inc., and the Power Authority of the State of New York (Indian Point Units 2 and 3), CLI-82-38, 16 NRC 1698, 1703 (1982). As required by 10 C.F.R. § 50.54(s)(2)(ii), the NRC balanced several factors, including: whether the deficiencies were significant for the plant in question; whether adequate interim compensating actions had been or will be taken promptly; and whether there were other compelling reasons for continued operation.

In January 1983, without having attempted pursuant to 10 C.F.R. § 2.206 to have the NRC review its December 23

Order, Petitioner Rockland County filed a petition for review of the NRC order in the United States Court of Appeals for the Second Circuit. Soon afterward, the New York Public Interest Research Group and the Union of Concerned Scientists ("NYPIRG-UCS") intervened and joined Rockland as petitioners. Petitioners asserted before the Court of Appeals as grounds for reversal of the Commission's determination that the Commission had failed to follow its own regulations and abused its discretion in declining to take enforcement action against the licensees to correct emergency planning deficiencies.

On May 27, 1983, the Court of Appeals for the Second Circuit emphasized in its decision that the applicable regulations gave "considerable latitude" to the Commission in connection with possible enforcement action to consider the relative significance of the deficiencies, whether adequate interim compensating measures had been or were to be taken promptly, and whether there were additional compelling reasons for continued operation. 10 C.F.R. § 50.54 (s)(2)(ii); *County of Rockland* v. *U.S. Nuclear Regulatory Commission,* 709 F.2d 766, 776 (2d Cir. 1983). Reviewing the record, the Court of Appeals found that:

> In this case, the Commission considered, among other factors, that substantial progress had been made to correct deficiencies at Indian Point, that the remaining problems would likely be corrected within a short period of time and that the likelihood of a severe nuclear accident in the intervening, "correction period" was extremely remote.

Rockland, 709 F.2d at 776. The Court found that all such factors could permissibly be considered by the Commission,

and rejected petitioners' argument that agency regulations had not been adequately followed.

Petitioners' second argument was that the Commission had acted arbitrarily and capriciously, and abused its discretion, by failing to take enforcement action. Pointing out that the arbitrary and capricious review standard was "narrow" and "highly deferential" to the agency action, the Second Circuit concluded that the Commission's decision was supported by substantial evidence in the record. Stating that "[w]e will not substitute our judgment for that of the Commission," the Court denied the petition for review. *Id.* at 777.

The review petition of Rockland County was also rejected by the Court of Appeals because of the County's failure to exhaust administrative remedies before the NRC. In this regard the Court stated that "the county could have participated in the December 1982 Commission proceedings and would have been entitled to party status for purposes of appeal. Alternatively, Rockland could have filed a section 2.206 petition challenging the December 1982 order and could have appealed in this forum if the Commission refused to grant its petition. . . ." *Id.* at 774.

Reasons Why Certiorari Should Not Be Granted

The argument of Rockland County in support of certiorari is wholly independent of the relevant NRC regulation, 10 C.F.R. § 50.54(s)(2)(ii). This regulation provides that:

> If after April 1, 1981, the NRC finds that the state of emergency preparedness does not provide *reasonable*

> *assurance* that adequate protective measures can and will be taken in the event of a radiological emergency . . . and if the deficiencies . . . are not corrected within four months of that finding, *the Commission will determine whether the reactor shall be shut down until such deficiencies are remedied or whether other enforcement action is appropriate.* In determining whether a shutdown or other enforcement action is appropriate, the Commission shall take into account, among other factors, whether the licensee can demonstrate to the Commission's satisfaction that the deficiencies in the plan are not significant for the plant in question, or that adequate interim compensating actions have been or will be taken promptly, or that there are other reasons for continued operation. (Emphasis supplied).

Although Petitioner claims that the Commission was required under this regulation to find that adequate protective measures can and will be taken in the event of a radiological emergency, it is plain from 10 C.F.R. § 50.54(s)(2)(ii) that the Commission was entitled to weigh the significance of deficiencies in the plans, to assess the adequacy of interim compensating actions, and to consider whether there were other compelling reasons for continued operation.

It is not disputed and the record clearly reflects that the Commission did this. At the end of this process, the Commission concluded that no enforcement action was necessary or appropriate at that time. The Commission relied upon the following factors in arriving at its decision: substantial progress had been made to correct deficiencies at Indian Point; the remaining problems would likely be corrected within a short period of time; and the likelihood of a severe nuclear accident in the intervening period was extremely remote. Thus, measured against the requirements

of 10 C.F.R. § 50.54(s)(2)(ii), the NRC's decision was manifestly rational and not arbitrary in any manner. The Court of Appeals noted that petitioners "have offered no convincing evidence to discredit the factual findings and conclusion reached by the Commission," *Rockland*, 709 F.2d at 777.

The balance of the petition for certiorari consists of Petitioner's own analysis and application of Commission regulations controlling enforcement. However, it is well established that the standard for review is not whether other fact-finders could have reached a contrary result. Precedent set by this Court provides that "[it does] not grant a certiorari to review evidence and discuss specific facts," *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

Comparing the content of this petition with the considerations governing review on certiorari as listed in Rule 17 of the Supreme Court Rules, it is obvious that this certiorari request is particularly inappropriate for Supreme Court review. There are no important federal questions presented by this petition, nor is the Court asked to construe Congressional legislation. There is no conflict among decisions of courts of appeal. There is no involvement in any way of any state court decision. Furthermore, Rockland County's petition was dismissed outright at the beginning of the Court of Appeals' opinion because of its failure to exhaust administrative remedies. The bulk of the Court of Appeals decision, which Petitioner now desires to have reviewed in its entirety, was directed at the NYPIRG-UCS appeal (from which no petition for certiorari was taken), and not at the petition of Rockland County, which was dismissed on procedural grounds. Petitioner has therefore uttterly failed to set forth a basis for the granting of its petition.

Conclusion

For the reasons set forth herein, the petition of Rockland County for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Appendix A

Pursuant to Rule 28, the following is a list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each of the Intervenors-Respondents.

1. Intervenor-Respondent Consolidated Edison Company of New York, Inc.'s affiliates and subsidiaries (except wholly owned) are:

Honeoye Storage Company

2. Intervenor-Respondent Power Authority of the State of New York does not have any parent company, affiliates or subsidiaries.